



388 17th St. N.W.
Suite 1100
Washington, DC 20006
202-775-8400 (ply)
202-857-0200 (fax)
www.sebac.org
sebac@sebac.org

May 4, 2001

VIA E-MAIL AND FACSIMILE

Ms. Susan L. Schneider
OUSD(AT&L)DP(DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

Re: Comments on Proposed Rule
DFARS Case 2001-D017

Dear Ms. Schneider:

This responds to the request for comments to the Department of Defense's (DOD) proposed rule amending the Defense Federal Acquisition Regulation to implement Section 803 of the National Defense Authorization Act for Fiscal Year 2002, which was published in the Federal Register on April 1, 2002. These comments are submitted on behalf of Small Environmental Business Action Coalition (SEBAC), a trade association composed of small businesses that perform environmental investigations, design, engineering, remediation, operations and maintenance, and ordnance and explosives work for federal agencies.

SEBAC small business members include disadvantaged, 8(a), woman-owned, veteran-owned, HubZone and Native American-owned businesses in the federal environmental remediation community. This membership performs substantial portions of the environmental remediation work for the Department of Defense, including the Army Corps of Engineers and the Air Force Center for Environmental Excellence. One of SEBAC's primary goals is to pursue policies, regulations and laws that foster a fair level of participation by small environmental engineering, remediation and unexploded ordnance businesses in the government marketplace.

Many of the small business members of SEBAC are contractors on multiple award contracts. As such, they are very concerned about the impact of the proposed regulations,

Ms. Susan L. Schneider
May 6, 2001
Page 2

SEBAC is concerned that the proposed regulations will have a negative impact on our members. As small businesses, SEBAC's members have limited resources, including limited bid and proposal (B&P) budgets. SEBAC's members have been willing to devote substantial portions of their limited B&P budgets to get on multiple award contracts, because once awarded such a contract, small businesses generally are required to expend little additional B&P funds to obtain orders under the contract.

Under the proposed regulations, businesses will now be forced to expend substantial B&P dollars to compete for virtually every order under a multiple award contract. At a certain point, the competitiveness of small business will be limited by the fact that they simply do not have the resources and B&P dollars to prepare proposals and compete for each order. Clearly, large businesses, with correspondingly larger B&P budgets, will be in a better position to compete for individual orders (although even their budgets will be impacted by the increased B&P spending). As such, rather than providing businesses with a "fair opportunity to submit an offer," the proposed regulations may actually deprive businesses of the opportunity to receive a fair share of the orders under any given multiple award contract.

In addition to being more expensive for businesses, the proposed regulations will undermine the DOD's ability to procure services inexpensively and efficiently. Forcing DOD contracting officers to give "fair notice" to all contractors and to evaluate each offer submitted by such contractors will be onerous and time consuming and will undoubtedly delay the contracting process. The proposed regulations will also require that DOD expand its acquisition work force and expend its own limited resources to hold competitions for each order. Of particular concern, because task order acquisition time and costs to customers will increase, the tendency of government contract organizations will be to lump task efforts into larger task efforts. Small businesses will likely not have the breadth to cover the larger scope of work, nor have the staffing resources to respond to a requirement or perform if awarded the task. This will decrease, if not preclude, the opportunity for small businesses to compete for the bundled tasks.

To summarize, while we recognize that the provision is statutory, we note for the record our general opposition to Section 803 because of a concern that its implementation will:

- * Create confusion as to whether requirements reserved only for small businesses, 8(a) firms, disadvantaged businesses, etc., are acceptable.
- * Increase government administrative costs associated with the "acquisition" phase of "task order" competition and administration.
- * Increase time to acquire services which, in turn, may affect technical performance/deliverable schedules that do not otherwise meet the "urgency" test for exceptions to competition.

Ms. Susan L. Schneidet
 May 6, 2001
 Page 3

- * Increase contractors' B&P time and expenditures, which are eventually passed on as indirect costs to government contracts.
- * Stifle the discussion and implementation of innovative techniques and processes being introduced to customers since customers will not be able to acquire such knowledge except through task order competition.
- * Create a tendency to bundle one or more tasks into one larger task, thus reducing the opportunity for small businesses to effectively compete against mid and large businesses.
- * Be counterproductive to small business initiatives since it will increase small business administrative costs and time.
- * Likely result in a drop in achieving small business (prime and subcontract) opportunities and goals.

Given the above, SEBAC requests that DOD take into account, and provide for, the fact that the proposed regulations will have a disparately negative impact on the ability of small businesses to obtain orders on multiple award contracts. Therefore, the proposed regulations should include an exemption for services purchased from small businesses, including disadvantaged, 8(a), woman-owned, veteran-owned, HubZone and Native American-owned businesses. Such an exemption would promote contracting with these entities and is consistent with the current Administration's policies, the Small Business Act and FAR Part 19. Contracting Officers would still have to comply with the ordering requirements of the particular multiple award contract and the "fair opportunity" requirement under FAR section 16.505.

In the event that DOD deems such an exemption to be inconsistent with Congressional intent, we offer the following additional comments:

1. For orders under multiple award schedules, proposed regulation 208.404-70 should specifically reference FAR section 8.402 and section "c" of GSA "Ordering Procedures for Services (Requiring a Statement of Work)" which provides: "The ordering office should give preference to small business concerns when two or more contractors can provide the services at the same firm-fixed price or ceiling price."
2. For orders under multiple award schedules, proposed regulation 208.404-70 should permit ordering offices to limit notice and restrict competition to small businesses. At present, contracting officers frequently place size limitations on orders from schedules and receive quotes from at least three small businesses. Contracting officers may interpret the new regulations as restricting their ability to place such limitations on orders from schedule contracts. Therefore, the proposed regulations should allow contracting officers giving "notice to as many

Ms. Susan L. Schneider
May 6, 2001
Page 4

contractors as practicable' under section 208.404-70 to impose size limitations when making a "practicability" determination.

3. Section 216.505-70 should also be revised to expressly permit contracting officers to limit notice and restrict competition on multiple award contracts to contractors meeting appropriate size limitations and to give preferences, when notice is given to all contractors, to small, small disadvantaged, 8(a), woman-owned, veteran-owned, HubZone and Native American-owned businesses.

4. If a multiple award contract was awarded to large businesses, small businesses and 8(a) companies and the solicitation restricted portions of the work to small businesses and/or 8(a) companies, then the regulations should permit the agency to limit its notice and restrict competition to small businesses or 8(a) companies for applicable delivery or task orders.

5. The proposed regulations identify 16.505(b)(2)(iii) as an exception to the fair competition requirement. Under this exception, the ordering office would not be required to make award on a "competitive basis" if the order is a follow-on to an order in which all offerors were given a "fair opportunity to be considered for the original award." It is unclear whether the "fair opportunity to be considered" means the order was issued on a "competitive basis" under the proposed regulations, or under the "fair opportunity" requirements in Part 16.505(b)(1). SEBAC believes the latter interpretation is the most fair to small businesses as it will allow them to continue performance on existing work without having to compete against large businesses when the order expires.

6. The proposed regulations should provide exceptions for the consideration "of price or cost under each order as one of the factors in the selection process" as set forth in proposed section 216.505-70. Specifically, the section should provide an exception for architect-engineer services acquired under FAR § 36.602-1, which does not provide for consideration of price or cost in the selection criteria. For this reason, the regulations should also state that they do not apply to acquisitions under the Brooks Architect-Engineers Act (40 U.S.C. § 541 *et seq.*).

7. The DOD should provide training to contracting officers to ensure that "competitive basis" procedures are as streamlined as possible. DOD should advise contracting officers of the minimum necessary in terms of competition procedures in order to fulfill the requirements of Section 803.

Ms. Susan L. Schneider
May 6, 2001
Page 5

Thank *you* for your considcrat~~ion~~ of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Pamela J. Mazza". The signature is fluid and cursive, with the first name "Pamela" and last name "Mazza" clearly distinguishable.

Pamela J. Mazza
Counsel for SEBAC